

## Senate Bill No. 33

### CHAPTER 779

An act to amend Sections 17590, 17591, 17592, 17593, and 17594 of, and to repeal Section 17595 of, the Business and Professions Code, relating to telephone solicitations.

[Approved by Governor October 10, 2003. Filed  
with Secretary of State October 11, 2003.]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 33, Figueroa. Telephone solicitations.

Existing law prohibits certain unfair business practices, including certain advertising practices. Existing law requires the Attorney General, not later than January 1, 2003, to maintain a "do not call" list, containing the telephone numbers and ZIP Codes of residential or wireless telephone subscribers who do not wish to receive unsolicited and unwanted telephone calls from telephone solicitors. Existing law requires telephone solicitors to pay a fee to the Attorney General to obtain copies of the "do not call" list. Existing law provides that it is unlawful for a person to obtain a "do not call" list for specified purposes. Existing law defines a telephone solicitor, places restrictions on these types of telephone calls, authorizes the imposition of a civil penalty of \$1,000 for violations of these provisions, and requires California to adopt any national "do not call" list established by any federal agency. Existing law makes it a crime to violate any of the provisions governing advertising.

This bill would require telephone solicitors to comply with all state and federal laws regarding telephone solicitations. The bill would make it a crime to deny or interfere with a subscriber's right to place a California telephone number on the "do not call" list. The bill would delete the civil penalty fine amounts and would instead require these amounts to be the same as those imposed by the Federal Trade Commission.

Because a violation of this bill's provisions with respect to the list would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

*The people of the State of California do enact as follows:*

SECTION 1. Section 17590 of the Business and Professions Code is amended to read:

17590. (a) There is a compelling state interest to protect the privacy of residential or wireless telephone subscribers who wish to avoid unsolicited and unwanted telephone solicitations. For the purposes of this article, a residential or wireless telephone subscriber shall be referred to as a subscriber.

(b) The act of becoming a subscriber should not undermine or lessen a person's right of privacy as guaranteed under Section 1 of Article I of the California Constitution.

(c) Congress has passed and the President has signed the "Do-Not-Call Implementation Act" (H.R. 395) which authorizes the Federal Trade Commission (FTC) to implement and enforce a national "do not call" registry. The FTC has decided to create as part of the federal Telemarketing Sales Rule (16 C.F.R. 310) a single nationwide Do Not Call Registry (16 C.F.R. 310.4 (b)(1)(iii)(B)), which is anticipated to be fully implemented by the late fall of 2003. Thus, it is the intent of the Legislature to adopt the California telephone numbers on the national "do not call" registry as the California "do not call" registry. Doing so will have many benefits for California residents and businesses. For instance, it is free for consumers to register on the national registry; California residents will only have to register on one registry, instead of two; registration on the national registry is only required once every five years; and businesses affected by the law will only be required to purchase one registry, instead of two. Additionally, adopting the California telephone numbers on the national "do not call" registry as the California "do not call" registry will mean that California does not have to set up its own administrative system to develop and maintain a California only "do not call" registry, thus saving California tax payers millions of dollars.

SEC. 2. Section 17591 of the Business and Professions Code is amended to read:

17591. It is unlawful for any person to do any of the following: using the "do not call" list for any purpose other than to comply with this article or applicable federal laws; denying or interfering in any way, directly or indirectly, with a subscriber's right to place a California telephone number on the "do not call" list; causing a subscriber to participate in and be included on the "do not call" list without the subscriber's knowledge or consent; selling or leasing the "do not call" list to a person other than a telephone solicitor; selling or leasing by a telephone solicitor of the "do not call" list; charging a fee to place a



California telephone number on the “do not call” list; and a telephone solicitor, either directly or indirectly, persuading a subscriber with whom it has an established business relationship to place his or her telephone number on the “do not call” list, if the solicitation has the effect of preventing competitors from contacting that solicitor’s customers.

SEC. 3. Section 17592 of the Business and Professions Code is amended to read:

17592. (a) For purposes of this article:

(1) A “telephone solicitor” means any person or entity who, on his or her own behalf or through salespersons or agents, announcing devices, or otherwise, makes or causes a telephone call to be made to a California telephone number that does any of the following:

(A) Seeks to offer a prize or to rent, sell, exchange, promote, gift, or lease goods or services or documents that can be used to obtain goods or services.

(B) Offers or solicits or seeks to offer or solicit any extension of credit for personal, family, or household purposes.

(C) Seeks marketing information that will or may be used for the direct solicitation of a sale of goods or services to the subscriber.

(D) Seeks to sell or promote any investment, insurance, or financial services.

(E) Seeks to make any telephone solicitation or attempted telephone solicitation as described in Section 17511.1.

(2) “Do not call” list means the California telephone numbers on the national “do not call” registry established and maintained by the Federal Trade Commission, as described in Section 310.4(b)(1)(iii)(B) of Title 16 of the Code of Federal Regulations. A “do not call” list is current if it was obtained from the Federal Trade Commission no more than three months prior to the date a call is made.

(b) A person or entity does not necessarily qualify as a telephone solicitor if the products or services of the person or entity are sold or marketed by an independent contractor whose business practices are not controlled by the person or entity.

(c) Except for telephone calls described in subdivision (e), beginning on the 31st day after the Federal Trade Commission makes its first “do not call” list available to telephone solicitors, no telephone solicitor shall call any telephone number on the then current “do not call” list and do any of the following:

(1) Seek to offer a prize or to rent, sell, exchange, promote, gift, or lease goods or services or documents that can be used to obtain goods or services.

(2) Offer or solicit or seeks to offer or solicit any extension of credit for personal, family, or household purposes.



(3) Seek marketing information that will or may be used for the direct solicitation of a sale of goods or services to the subscriber.

(4) Seek to sell or promote any investment, insurance, or financial services.

(5) Seek to make any telephone solicitation or attempted telephone solicitation as described in Section 17511.1.

(d) No person or entity that sells, leases, exchanges, or rents telephone solicitation lists shall include in those lists those telephone numbers that appear on the current “do not call” list, except that this subdivision does not apply to lists used for directory assistance and numbers published in telephone directories that list substantially all publicly available telephone numbers in a specific geographic area.

(e) Subdivision (c) shall not apply to any of the following:

(1) Telephone calls made pursuant to the express agreement, in writing, of the subscriber to place calls to that California telephone number. This written agreement shall clearly evidence the person’s authorization that calls made by or on behalf of a specific party may be placed to that California telephone number, and shall include the signature of that person. In any dispute regarding whether a subscriber has provided this express written permission, the telephone solicitor has the burden of proving that the subscriber has provided this permission by producing the original or a facsimile document, signed by the subscriber, evidencing that permission; or an advertisement by the subscriber. “Express agreement” does not include any consent or permission included in any contract of adhesion.

(2) Telephone calls made pursuant to the express request of the subscriber. “Express request” may include a telephone call from a person or entity who has been provided the subscriber’s telephone number and name as a referral from a solicitor with which the subscriber has an established business relationship, if that solicitor has obtained the subscriber’s express request for the referral. “Express request” does not include any consent or permission included in any contract of adhesion. A telephone call is presumed not to be made at the express request of a subscriber if one of the following occurs, as applicable:

(A) The call is made 30 business days after the last date on which the subscriber contacted a business with the purpose of inquiring about the potential purchase of goods or services.

(B) The call is made 30 business days after the last date on which the subscriber consented to be contacted.

(C) The call is made after the subscriber has requested that no further telephone calls be made to him or her.

(D) The call is made 30 business days after a product or service becomes available where the subscriber has made a request to the



business for that product or service that is not then available, and requests a call when the product or service becomes available.

(3) Telephone calls made in connection with the collection of a debt or the offer by a creditor to the subscriber of an extension of credit to pay a delinquent obligation owed by the subscriber to that creditor.

(4) Telephone calls made to a subscriber if the telephone solicitor has an established business relationship with the subscriber. As used in this article, “established business relationship” means a relationship between a seller and a subscriber based on the subscriber’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a telemarketing call. If a subscriber purchases or obtains a product or service through a licensed agent or broker, for purposes of this article an established business relationship is created with the licensed agent or broker individually, apart from and in addition to, any established business relationship that may have been created by a licensed agent or broker acting on behalf of another, and the licensed agent or broker is a telephone solicitor, as defined in subdivision (a). Notwithstanding the provisions of this paragraph, an established business relationship does not exist between the subscriber and any separate legal entity associated with the telephone solicitor not acting as an agent or vendor on behalf of the telephone solicitor, as defined in subdivision (a), unless the separate legal entity shares the brand name of a business with which the subscriber has an otherwise established business relationship. If the subscriber instructs the telephone solicitor to place the subscriber on the telephone solicitor’s list pursuant to Section 64.1200 of Title 47 of the Code of Federal Regulations and Section 310.4(b)(iii)(A) of Title 16 of the Code of Federal Regulations, that instruction shall be binding on the entity with which the subscriber has the established business relationship, with any entity that has the shared brand name, and all other entities that share that brand name, none of whom may initiate further telephone solicitation calls to that subscriber. Separate legal entities include, but are not limited to, any parent company or entity, any subsidiary company or entity, any partnership or copartner, any joint venture or venturer, association member, or comember, or any affiliated company or entity.

(5) Telephone calls made by an individual businessperson or a small business if the individual businessperson or small business employs no more than five full- or part-time employees or independent contractors, the individual businessperson or a principal of the small business makes the telephone calls himself or herself for the sale of goods or services offered by that individual businessperson or small business, and the telephone calls are made to subscribers within a 50-mile radius of the



location of the individual businessperson or small business. For purposes of this section, the services offered by the individual businessperson or small business cannot be telemarketing services. For purposes of this section, those independent contractors and employees with whom an individual businessperson or a small business is required to have a written independent contractor or employment agreement pursuant to a regulatory scheme to ensure regulatory accountability of those independent contractors or employees, are not counted against the total referenced above.

(6) A telephone call made solely to verify that a subscriber, and not an unauthorized third party, has terminated an established business relationship.

(7) Telephone calls made by a tax-exempt charitable organization.

(8) A telephone call made for the purpose of soliciting a donation without the purchase of goods or services.

(f) Nothing in this section prohibits a telephone solicitor from contacting by mail a subscriber whose telephone number appears on the “do not call” list to obtain the subscriber’s express written permission allowing the telephone solicitor to make the calls described in subdivision (c). In any dispute regarding whether a subscriber has provided this express written permission, the telephone solicitor has the burden of proving that the subscriber has provided this permission by producing the original or a facsimile document, signed by the subscriber, evidencing that permission.

SEC. 4. Section 17593 of the Business and Professions Code is amended to read:

17593. (a) The Attorney General, a district attorney, or a city attorney may bring a civil action in any court of competent jurisdiction against a telephone solicitor to enforce the article and to obtain any one or more of the following remedies:

(1) An order to enjoin the violation.

(2) A civil penalty of up to the penalty amount that the Federal Trade Commission may seek pursuant to 15 U.S.C. Sec. 45(m)(1)(A) as specified in 16 C.F.R. 1.98.

(3) Any other relief that the court deems proper.

(b) Any person who has received a telephone solicitation that is prohibited by Section 17592, or whose telephone number was used in violation of subdivision (f) of Section 17591, may bring a civil action in small claims court for an injunction or order to prevent further violations. If a person obtains an injunction or order under this subdivision and service of the injunction or order is properly effected, a person who thereafter receives further solicitations in violation of the injunction or order within 30 days after service of the initial injunction



or order, may file a subsequent action in small claims court seeking enforcement of the injunction or order and a civil penalty to be awarded to the person in an amount up to one thousand dollars (\$1,000). For purposes of this subdivision, a person's claims may not be aggregated to establish jurisdiction in a court other than small claims court. For purposes of this subdivision, a defendant is not required to personally appear, but may appear by affidavit or by written instrument.

(c) The rights, remedies, and penalties established by this article are in addition to the rights, remedies, or penalties established under other laws.

(d) It shall be an affirmative defense to any action brought under this article that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketer instruction and training.

SEC. 5. Section 17594 of the Business and Professions Code is amended to read:

17594. Any information regarding any California telephone number which appears on the "do not call" list in the possession of the Attorney General, whether obtained from the Federal Trade Commission or submitted to the Attorney General by a subscriber for inclusion in the "do not call" list, shall not be disclosed pursuant to a request made under Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code and shall also be privileged under Section 1040 of the Evidence Code. Notwithstanding the foregoing, nothing in this section prevents the Attorney General from providing a certificate stating whether a specific telephone number was on the "do not call" list that was effective on the specified date or range of dates in response to:

(a) An inquiry from any law enforcement agency that is investigating, prosecuting, or responding to an allegation of a violation of this article.

(b) An inquiry from an individual who is investigating or litigating an alleged violation of this article and who seeks the certificate regarding his or her telephone number or to an inquiry from the person who is responding to the allegation.

SEC. 6. Section 17595 of the Business and Professions Code is repealed.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or



changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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